in the

Supreme Court

of the

United States

Supreme Court, U. S.
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OCTOBER TERM, 1979

CASE NO. 79-995

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (AFL-CIO)
Petitioner,

vs.

THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
Respondent.

PETITIONERS' REPLY BRIEF ON JURISDICTION

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American Federation of Government Employees, the Petitioner herein, files this its reply brief on jurisdiction.

ARGUMENT

Respondent Judge Gale, in his Brief on Jurisdiction, contends that Petitioner (defendant AFGE) had a right of appeal to the Supreme Court of Florida and that instead of appealing, discretionary certiorari was sought based upon decisional conflict. The implication is that the Supreme Court of Florida would have been required to take jurisdiction of this cause if the notice had been labelled "Appeal" instead of "Petition for Writ of Certiorari." Thus, it is argued that by not exercising its "right of appeal," Petitioner (defendant AFGE) failed to exhaust the state appellate remedies.

The reasoning of Respondent Judge Gale is not supported by case law or statute. The 1954 Bartow case he cites as authority, has been specifically superseded by Rule 9.040 (b) & (c) of the Florida Rules of Appellate Procedure. Pursuant to Rule 9.040 it is clear that if the proper label should have been "Appeal" instead of "Petition for Writ of Certiorari" the Supreme Court of Florida would have treated the Petition as a notice of appeal and taken jurisdiction accordingly. West's F.S.A. Vol. 32 Rules of App. Proc., Rule 9.040 (b) & (c) (1979 Special Pamphlet).

The above rule was among the 1977 revisions to the Appellate Rules which were adopted by the Supreme Court of Florida on October 27, 1977 to be effective March 1, 1978, *In re Proposed Florida Appellate Rules* 351 So.2d 981 (Fla. 1977). The committee notes to Rule 9.040 (b) & (c) state in part: "Under this rule, a Petition for a Writ of Certiorari should be treated as a Notice of Appeal, if timely." The committee further stated:

> This rule is intended to supersede Nellen v. State, 226 So.2d 354 (Fla. 1st DCA 1969), where a petition for a common law writ of certiorari was dismissed by the District Court of Appeal because review was properly by appeal to the appropriate circuit court, and Engel v. City of North Miami, 115 So.2d 1 (Fla. 1959), where a petition for a writ of certiorari was dismissed because review should have been by appeal.

The Engel case cited *Bartow Growers Proc. Corp. v. Florida Growers Proc. Coop.*, 71 So.2d 165 (Fla. 1954) as authority. It should also be noted that Respondent Judge Gale never advanced the "right of appeal" argument to the Supreme Court of Florida (See jurisdictional brief C.R. 67-77).

However, he did advance a similar argument in the District Court of Appeal of Florida, Third District, by a Motion to Transfer the cause to the Supreme Court of Florida (C.R. 78-81). The District Court of Appeal properly denied the Motion to Transfer (C.R. 86). No attempt thereafter was made to raise the "right of appeal" argument to the Supreme Court of Florida. If said argument would have been raised, the Supreme Court of Florida would have simply treated the Petition for Writ of Certiorari as an appeal, or on the strength of Florida case law, the court no doubt would have concluded that there was no "right of appeal."

Regarding a question of "right of appeal," the Supreme Court of Florida has explained what is meant by a construing of the Constitution. *In Armstrong v.*

City of Tampa 106 So.2d 407, 409 (Fla. 1958) Justice Thornal stated:

> . . . the mere fact that a constitutional provision is indirectly involved in the ultimate judgment of the trial court does not in and of itself convey jurisdiction by direct appeal to this court. We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.

The above statement of the Supreme Court of Florida clearly shows that refusal to apply the doctrine of preemption, or application of the doctrine does not require an actual construing of the supremacy clause of the U.S. Constitution.

It is clear that the order the Petitioner (defendant AFGE) is asking this court to review, is an order rendered by the highest court of the state in which a decision could be had. Robert L. Stern and Eugene Gressman have the following to say about the judgments of intermediate state appellate courts:

> The judgment of an intermediate state appellate court is that of the highest court in which decision can be had if the state law makes its decision final and nonreviewable.

> See Williams v. Florida, 399 U.S. 78, 80, n. 5 (District Court of Appeal of Florida); . . . But if there is discretionary review by a higher state court, the exercise of such discretion must be sought. . . . Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under §1257. Stern and Gressman, *Supreme Court Practice* (5th ed. 1978) pp. 204-206, The Bureau of National Affairs.

Petitioner (defendant AFGE) exhausted all avenues available under the Florida Constitution[1] and the Florida Rules of Appellate Procedure to have the order of the District Court of Appeal of Florida, Third District reviewed by the Supreme Court of Florida, thus, when said court declined to take jurisdiction, the order became an order rendered by the highest court of Florida in which a decision could be had and it is properly before this court under 28 U.S.C. Sec. 1257 (3).

Turning to the issue of federal preemption and the exhaustion of administrative remedies doctrine, Respondent Judge Gale states with reference to the duty of fair representation, "Significantly, the complaint does not allege that DEGRIO is a member of the collective bargaining unit, but merely states that DEGRIO was a member of the union."

Petitioner (defendant AFGE) respectfully requests this court to note that significantly, plaintiff DeGrio, in her amended complaint, did not allege that she was not

[1]Fla. Const. Art. V Sec. 3 (Pocket Part)

a member of the Collective Bargaining Unit, nor did she raise such an issue in resisting the two Motions to Dismiss (C.R. 87-119). It seems elementary that, regardless of petitioner DeGrio's status with reference to the Collective Bargaining Unit, if she alleges to be a member of the union (defendant AFGE), any duty owed to her, necessarily had to flow from the Executive Order which created said union. Absent the Executive Order there would be no union in which plaintiff DeGrio could have been a member. At the very least, the state court was presented with a question of whether or not the Executive Order and the administrative procedures thereunder are applicable to plaintiff DeGrio's cause. In these circumstances the state court must defer to the assistant Secretary of Labor to make the initial determination of whether any duty is owed from petitioner (defendant AFGE) to plaintiff DeGrio and whether an alleged breach of said duty is a proper subject covered by the Administrative Procedures established pursuant to the Executive Order.

Plaintiff DeGrio, as a union member, also had an obligation to allege that she exhausted or attempted to exhaust her administrative remedies pursuant to the union's national constitution (Pertinent parts included in C.R. pp. 40-42, see Articles XIII and XIV). In his brief on jurisdiction, Respondent Judge Gale brushes over very lightly, the doctrine of exhaustion of administrative remedies. The requirement to exhaust administrative remedies is very important to Federal Labor Policy. Without it, courts would be burdened with a heavy volume of direct litigation involving numerous labor relations matters that can, and should be, resolved by administrative agencies. To allow plaintiff DeGrio's

case to proceed in state court would establish a precedent that permits union members to sue a union in common law negligence, without exhausting administrative remedies, anytime the member is disgruntled with the representation afforded by the union. The result would be patently incompatible with the announced policy of the courts in deferring on judicial determination of such member-union disputes until resort to reasonable internal appeal procedures has exhausted the possibility that the matter will be resolved within the family. *Manica v. Chrysler Corp., et al,* 83 LC 10464 (E.D. Mich 1978).

Respondent Judge Gale attempts to justify a direct suit in state court for damages on a Common Law Negligence Theory, on the basis that a similar remedy is not available under the Executive Order (p. 13 of Respondent's brief). Plaintiff DeGrio apparently drew her own conclusion in this regard without ever filing her cause with the assistant Secretary of Labor to determine what remedies were available. It appears from the reasoning in *Garmon,* infra, this court does not support an exception to the preemption doctrine on the basis a state court is able to award compensatory damages where an administrative agency cannot. In *Garmon,* the court stated:

> Even the State's salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

The court went on to hold that to allow a State Court to award damages where an administrative

agency cannot, only accentuates the danger of conflict. In *Lockridge,* infra, this court concluded that "disparities in remedies could produce substantial conflict."

Respondent argues further that simple negligence for violating the tort standard of due care does not amount to a breach of the duty of fair representation. However, this court is respectfully requested to consider a case decided by the sixth circuit, *Ruzicka v. General Motors,* 523 F.2d. 306 (6th Cir. 1975), which has generally been accepted as establishing the principle, that in certain circumstances a union could violate its duty of fair representation when it handles a grievance negligently. *Ruzicka* has been widely cited for its holding on the negligent representation issue.

Respondent Judge Gale cites *Bebensee v. Ross Pierce Electric Corp.,* 253 N.W.2d 633 (S.Ct. Mich. 1977) in support of his argument that even if this cause were characterized as a duty of fair representation case, the state courts have jurisdiction to determine cases concerning violations of the duty of fair representation. In the *Bebensee* case, an employee brought an action charging a common law conspiracy by a former employer and the employee's labor union. The Supreme Court of Michigan cites with approval, *Amalgamated Association of Motor Coach Employees, v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), and *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), and *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). In *Bebensee,* the court said that the employee's charge of common law conspiracy, if true, would constitute a breach of duty of

fair representation and thus, the state court would have jurisdiction under an exception to the doctrine of federal preemption; however, the court went on to hold that the federal preemption doctrine applied in that instance and the state court did not have jurisdiction of the subject matter because the employee failed to specifically present his case on a duty of fair representation theory. The court further stated, "It is the conduct, not the label which determines preemption." In considering whether the alleged tort of common law conspiracy presented an exception to the preemption doctrine, the court held that the complaint failed to satisfy the criteria for state jurisdiction under the "Farmer" test. The court stated:

> Although, in the instant case, as in all others, the state has an interest in protecting workers from discriminatory treatment by a union, such an interest would arguably appear to be adequately protected by the available federal administrative remedies. To the extent that the alleged conduct is not "outrageous" or does not involve violence, Farmer suggests that there is no substantial state interest in providing a forum.

It is patently clear that the allegations in plaintiff DeGrio's complaint fall far short of satisfying the criteria for applying an exception to the preemption doctrine.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioner (defendant AFGE's) Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February , 1980, pursuant to Supreme Court Rule 33, three copies of the foregoing Petitioner's Reply Brief on Jurisdiction were mailed to George M. Nachwalter, Esquire, Nachwalter, Christie & Falk, P.A., Attorneys for Plaintiff below, Joello DeGrio and Attorneys for Respondent, The Honorable John Gale. A copy was also mailed to the Honorable John Gale, Circuit Judge of the Eleventh Judicial Circuit in and for Dade County, Florida, Dade County Courthouse, Miami, Florida.

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